



Litigation Update

Litigation Section News

December 2008

Shareholder must be identified before filing derivative action.

Before shareholders may file a derivative action, they must file a demand upon the board of directors; if the directors fail to act, the action may be filed. However, under *Federal Rule of Civil Procedure* 23.1 the demand must be adequate and must disclose the identity of the shareholders who seek to file a derivative action. The Ninth Circuit held that failure to make such a disclosure supports dismissal of the action. *Potter v. Hughes* (9th Cir.; October 10, 2008) 546 F.3d 1051, [2008 DJDAR 15696].

Additional pay to Los Angeles Superior Court judges violates California Constitution.

Since the 1980s, the County of Los Angeles has paid Superior Court Judges employment benefits in addition to their state salaries. This now amounts to \$46,436 per year. (It has been suggested that the generosity of the Los Angeles Board of Supervisors may be related to the fact that the salaries received by the members of the Board are keyed to the salaries of Superior Court Judges.) The Court of Appeal has ruled that the payment violates Section 19, Article VI of the California Constitution which provides that the Legislature "prescribe compensation for judges of courts of record." *Sturgeon v. County of Los Angeles* (Cal.App. Fourth Dist., Div. 1; October 10, 2008) (As mod. November 11, 2008) 167 Cal.App.4th 630, [84 Cal.Rptr.3d 242, 2008 DJDAR 15715].

Funding for services to female victims of domestic violence violates equal protection. In *Woods v. Horton* (Cal.App. Third Dist.; October 14, 2008) 167 Cal.App.4th 658, [84 Cal.Rptr.3d 332, 2008 DJDAR 15763], male victims of domestic violence sued to challenge

statutes funding programs for services to persons harmed by such violence limited to female victims. The trial court denied their petition finding that men were not similarly situated because there were a greater number of female victims. The Court of Appeal reversed. The mere fact that there were more female victims did not provide a compelling state interest in gender classification.

Cross-examination must be permitted in quasi-judicial administrative proceeding.

Where a rent review board refused to permit claimants to be cross-examined, it violated due process and the decision must be reversed and remanded. To deny an opponent the right to cross-examine claimants denied it the right to a fair trial. *Manufactured Home Communities, Inc. v. County of San Luis Obispo* (Cal.App. Second Dist., Div. 6; October 15, 2008) 167 Cal.App.4th 705, [84 Cal.Rptr.3d 367, 2008 DJDAR 15820].

ABA reports: new opportunities for lawyers:

The October 17, 2008 weekly newsletter of the ABA reports "Law firms gearing up to offer advice on the \$700 billion bailout bill hope to help clients—as well as their own bottom lines. Law firm marketing consultant Peter Zeughauser told the *Wall Street Journal* (sub. req.) why lawyers are so eager to counsel clients about the bill, known as the 'Troubled Asset Relief Program.' People are hoping this becomes the Full Employment Act for lawyers, he told the newspaper."

Validity of contract with arbitration clause must be decided by arbitrators. In *Granite Rock Company v. Int'l Bhd. of Teamsters* (9th Cir.; October 22, 2008) 546 F.3d 1169, [2008 DJDAR 16023], the Teamsters, being sued for breach of

contract by an employer, denied that the contract, on which the action was based, was ever executed. The contract contained an arbitration clause. The Ninth Circuit held that the validity of the contract was to be determined, not by the court, but by the arbitrators.

Federal statute preempts claim based on failure to install lap/shoulder belt.

Under the then effective Federal Motor Vehicle Safety standard, a manufacturer could either, install a lap belt, or a lap/shoulder belt in the rear seat center position. Plaintiff's heirs sued the automobile manufacturer for wrongful death allegedly resulting from the absence of a shoulder belt in the center of the rear seat. The complaint asserted causes of action for strict products liability, negligence, deceit, and wrongful death. The Court of Appeal affirmed the trial court's granting judgment on the pleadings, holding that the federal regulation preempted an action based on state causes of action. *Williamson v. Mazda Motor of America, Inc.* (Cal.App. Fourth Dist., Div. 3; October 22, 2008) (As mod. Nov. 18, 2008) 167 Cal.App.4th 905, [84 Cal.Rptr.3d 545, 2008 DJDAR 16007].

Court must permit discovery before ruling on class certification.

In *Lee v. Dynamex, Inc.* (Cal.App. Second Dist., Div. 7; August 26, 2008) 166 Cal.App.4th 1325, [83 Cal.Rptr.3d 241], a purported class

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action, the trial court denied plaintiff leave to discover class member identities and denied class certification on grounds the class was not sufficiently ascertainable. The Court of Appeal reversed, holding that the trial court abused its discretion in denying discovery and should have permitted the discovery before ruling on the certification motion. See also, *Pioneer Electronics (USA) v. Sup.Ct. (Olmstead)* (2007) 40 Cal.4th 360, [53 Cal.Rptr.3d 513].

Supreme Court will decide whether employers must do more than "provide" rest periods. In our September newsletter, we noted that in *Brinker Restaurant Corp. v. Sup.Ct. (Hohnbaum)* (July 22, 2008) 165 Cal.App.4th 25, [80 Cal.Rptr.3d 781], the Fourth District Court of Appeal held that, although employers may not impede, discourage, or dissuade employees from taking rest and meal periods, they need only provide for them and need not ensure that employees actually take the required times off. Our Supreme Court has granted review. (Rev. granted October 22, 2008; Case No. S166350). Now, we will have to wait a year, or so, before we find out how far employers must go in forcing their employees to take rest breaks. (Are we justified in firing an employee who refuses to eat her lunch?)

In derivative action, corporation is only a nominal defendant and cannot defend the action.

Where shareholders bring a derivative action on behalf of a corporation, the corporation is a defendant. But, the action is filed on behalf of the corporation, not against it. Therefore, the corporation is only a nominal defendant and is not permitted to defend the action filed on its behalf. It was, thus, improper for the corporate defendant in such an action to demur to the complaint and the Court of Appeal reversed the judgment of dismissal following the sustaining of such a demurrer. *Patrick v. Alacer Corp.* (Cal.App. Fourth Dist., Div. 3; October 23, 2008) (As mod. Nov. 22, 2008) 167 Cal.App.4th 995, [84 Cal.Rptr.3d 642, 2008 DJDAR 16079].

Party may not appeal from a judgment if it accepts a benefit of the judgment.

Where a litigant accepts the benefit of a judgment, it cannot thereafter appeal the judgment. In *Satchmed Plaza Owners Association v. UWMC Hospital Corp.* (Cal.App. Fourth Dist., Div. 3; October 23, 2008) 167 Cal.App.4th 1034, [84 Cal.Rptr.3d 585, 2008 DJDAR 16123], plaintiff claimed the right to purchase 22 owned and 12 leased units in a condominium office building. The trial court agreed as to the 22 owned units but denied relief as to the 12 leased units.

Plaintiff completed the purchase of the 22 units and then appealed from the judgment with respect to the remaining units. The Court of Appeal dismissed the appeal. By accepting the benefit of the judgment, plaintiff waived the right to appeal to the other portion of the judgment.

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

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